

Supreme Court of the United States

OCTOBER TERM, 1960

No. 566

ROBERT F. KENNEDY, ATTORNEY GENERAL
OF THE UNITED STATES, APPELLANT

vs.

FRANCISCO MENDOZA-MARTINEZ

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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SUPREME COURT OF THE UNITED STATES

No. 54, October Term, 1957

FRANCISCO MENDOZA-MARTINEZ, PETITIONER

vs.

**ARGYLE F. MACKEY, Commissioner of Immigration and
Naturalization Service and WILLIAM P. ROGERS, At-
torney General of the United States**

JUDGMENT—April 7, 1958

On writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

This cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Ninth Circuit, and was duly submitted.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause, be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of California for determination in light of *Trop v. Dulles*, Secretary of State, No. 70, October Term, 1957, decided March 31, 1958.

April 7, 1958

[SEAL]

A true copy JOHN T. FEY,
Test:

Clerk of the Supreme Court of the United States

Certified this Twelfth day of May, 1958
By R. J. Blanchard, Deputy

[fol. 2]

[File endorsement omitted]

• • • • •

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

Civil No. 1314-ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF

v.

ARGYLE R. MACKEY, The Commissioner of Immigration
and Naturalization, and WILLIAM P. ROGERS, Attorney
General of the United States, DEFENDANTS

TRIAL STIPULATION—Filed July 7, 1958

The following admissions and agreements of fact were
made by the parties and require no proof:

I.

The plaintiff, Francisco Mendoza-Martinez claims residence within the City of Delano, State of California, and within the jurisdiction of this Court.

II.

The defendant, William P. Rogers, is the duly appointed, qualified and acting Attorney General of the United States, and as such is the head of the Department of Justice.

III.

Plaintiff was born in the United States on March 3, 1922, and thus was a citizen of the United States at birth.

[fol. 3]

IV.

Under the laws of Mexico plaintiff is now, and ever since his birth has been, a citizen and national of the Republic of Mexico.

V.

During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

VI.

Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946 for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

VII.

On June 23, 1947, plaintiff upon his plea of guilty was convicted in the United States District Court for the Southern District of California for violation of Section 11 of the Selective Service and Training Act of 1940. He was sentenced to imprisonment for a period of one year and one day.

VIII.

On February 3, 1953 a warrant of arrest in deportation proceedings was served upon the plaintiff. Pursuant to this warrant, a deportation hearing was held on May 25, 1953; and on September 11, 1953, the Special Inquiry Officer who presided at the hearing rendered his decision, ordering that plaintiff be deported from the United States as an alien.

IX.

Plaintiff appealed the decision of the Special Inquiry Officer to the Board of Immigration Appeals, Department of Justice, and on October 23, 1953, said Board dismissed plaintiff's appeal.

[fol. 4]

X.

The cause herein is submitted to the Court for decision upon the above admissions and agreements, all the records and files herein and all evidence heretofore received.

4
ISSUES OF FACT TO BE TRIED

None

ISSUES OF LAW

I.

Is Section 401 (j) of the Nationality Act of 1940 unconstitutional; either on its face or as applied to the plaintiff?

The foregoing Trial Stipulation is hereby approved.
DATED: This 30th day of June, 1958.

DI GIORGIO AND DAVIS

By Thomas R. Davis
Attorneys for Plaintiff.
LAUGHLIN E. WATERS
United States Attorney
RICHARD A. LAVINE
Assistant U. S. Attorney
Chief of Civil Division

/s/ James R. Dooley
JAMES R. DOOLEY
Assistant U. S. Attorney
Attorneys for Defendants

The foregoing admissions of fact having been made by the parties, and issues of fact and law being thereupon stated and agreed to; the Court hereby approves the [fol. 5] foregoing Trial Stipulation which shall govern the course of the trial unless modified to prevent manifest injustice.

DATED: This 7th day of July, 1958.

/s/ Gilbert H. Jertberg
Judge, U. S. District Court

[fol. 6]

[File endorsement omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

Civil No. 1314-ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF

v.

ARGYLE R. MACKEY, The Commissioner of Immigration
and Naturalization, and WILLIAM P. ROGERS, Attorney
General of the United States, DEFENDANTS

MEMORANDUM AND ORDER—Sept. 24, 1958

On the 22nd day of September, 1955, this Court entered judgment in the above cause, which judgment adjudicated and decreed that the plaintiff lost his United States citizenship and nationality through expatriation by remaining outside the jurisdiction of the United States after September 27, 1944, in time of war and during a period declared by the President of the United States to be a period of national emergency, for the purpose of evading and avoiding training and service in the land and naval forces of the United States. This judgment was affirmed by the Court of Appeals for the Ninth Circuit on November 2, 1956. (238 Fed. 2d 239)

[fol. 7] On April 7, 1958, the Supreme Court of the United States vacated the judgment and remanded the cause "to the United States District Court for determination in light of *Trop v. Dulles*, ante, p. 86, decided March 31, 1958". (356 U.S. 258)

Pursuant to the order of the Supreme Court a hearing was held on July 10, 1958. The plaintiff was represented by DiGiorgio and Davis, Thomas R. Davis appearing, and the defendant was represented by Laughlin E. Waters, United States Attorney, James R. Dooley, Assistant United States Attorney, appearing.

At the original trial, the only issue presented to the Court for determination was the constitutionality of Section 401(j) of the Nationality Act of 1940 (54 Stat. 1137)

as amended, the parties having stipulated that the plaintiff, a citizen of the United States by birth, at the age of 20 and while subject to the Selective Service and Training Act, (Title 50 App. U.S.C.A. 312 et seq) in the year 1942 departed from the United States for the Republic of Mexico for the sole purpose of evading and avoiding training and service in the armed forces of the United States, and remaining in Mexico continuously from some time in 1942 until on or about November 1, 1946; for the sole purpose of evading and avoiding such training and service.

At the hearing held on July 10, 1958, the cause was submitted to the Court for determination on a trial stipulation of the parties containing the following provisions:

1. Plaintiff was born in the United States on March 3, 1922, and thus was a citizen of the United States by birth.

[fol. 8] 2. Under the law of Mexico, plaintiff, now and ever since his birth, has been a citizen and national of the Republic of Mexico.

3. During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

4. Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946 for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

5. On June 23, 1947, plaintiff upon his plea of guilty was convicted in the United States District Court for the Southern District of California for violation of Section 11 of the Selective Service and Training Act of 1940. He was sentenced to imprisonment for a period of one year and a day.

6. On February 3, 1953, a warrant of arrest in deportation proceedings was served upon the plaintiff. Pursuant to this warrant, a deportation hearing was held on May 25, 1953; and on September 11, 1953, the Special Inquiry Officer who presided at the hearing rendered his decision, ordering that plaintiff be deported from the United States as an alien.

7. Plaintiff appealed the decision of the Special In-

7

quity Officer to the Board of Immigration Appeals, Department of Justice, and on October 23, 1953, said Board dismissed plaintiff's appeal.

8. Issues of fact to be tried: None.

9. Issues of law: Is Section 401(j) of the Nationality Act of 1940 unconstitutional, either on its face or as applied to the plaintiff?

[fol. 9] The trial stipulation provided that the cause would be submitted to the Court for decision on said stipulation and on all of the records, files and evidence theretofore received.

The proof in this cause is conclusive that the plaintiff, a citizen of the United States, departed from the United States for the Republic of Mexico for the sole purpose of evading and avoiding training and service in the armed forces of the United States, and remained in Mexico continuously from some time in 1942 until on or about 1946 for the sole purpose of evading and avoiding such training and service.

I have reconsidered this case in the light of *Trop v. Dulles*, 356 U.S. 86, as directed by the Supreme Court. The *Trop* case did not involve Section 401(j) of the Nationality Act of 1940, but involved Section 401(g) of that Act which provides that a citizen shall lose his nationality "by deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by a court martial and as a result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces; * * *"

In the *Trop* case, the Chief Justice, in an opinion joined by Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Whittaker, concluded that even if citizenship could be divested in the exercise of some governmental power, Section 401(g) violates the Eighth Amendment because it is penal in nature and prescribes a "cruel and unusual punishment".

Mr. Justice Black in an opinion joined by Mr. Justice Douglas concurred in the opinion of the Chief Justice and expressed the view that even if citizenship could be involuntarily divested, the power to denationalize cannot be placed in the hands of military authorities.

[fol. 10] Mr. Justice Brennan concluded that it lies beyond the power of Congress to enact Section 401(g) because "the requisite rational relation between this statute and the war power does not appear"

On the same day as the decision in the Trop case, the Supreme Court rendered its decision in *Perez v. Brownell*, (356 U.S. 44). In that case the petitioner, a national of the United States by birth, had been declared to have lost his American citizenship by operation of Section 401(e) and Section 401(j) of the Nationality Act of 1940 as amended. Section 401 of that Act provided that "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: . . . (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory. . . . (j) Departing from or remaining outside the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

Mr. Justice Frankfurter delivered the opinion of the Court which held Section 401(e) to be constitutional. In a closing paragraph of the opinion it is stated: "It cannot be said, then, that Congress acted without warrant when, pursuant to its power to regulate the relations of the United States with foreign countries, it provided that anyone who votes in a foreign election of significance politically in the life of another country shall lose his American citizenship. To deny the power of Congress to [fol. 11] enact the legislation challenged here would be to disregard the constitutional allocation of governmental functions that it is this Court's solemn duty to guard." (356 U.S. 62.)

In the closing paragraph of that opinion it is stated:

"Because of our view concerning the power of Congress with respect to Section 401(e) of the Nationality Act of 1940, we find it unnecessary to consider—indeed, it would be improper for us to adjudicate—the constitutionality of Section 401(j), and we expressly decline to rule on that important question at this time."

In his opinion in the *Trop* case, the Chief Justice stated: "Since a majority of the Court concluded in *Perez v. Brownell*, that citizenship may be divested in the exercise of some governmental power, I deem it appropriate to state additionally why the action taken in this case exceeds constitutional limits, even under the majority's decision in *Perez*. The Court concluded in *Perez* that citizenship could be divested in the exercise of the foreign affairs power. In this case, it is urged that the war power is adequate to support the divestment of citizenship. But there is a vital difference between the two statutes that purport to implement these powers by decreeing loss of citizenship. The statute in *Perez* decreed loss of citizenship—so the majority concluded—to eliminate those international problems that were thought to arise by reason of a citizen's having voted in a foreign election. The statute in this case, however, is entirely different. Section 401(g) decrees loss of citizenship for those found guilty of the crime of desertion. It is essentially like Section 401(j) of the Nationality Act, decreeing loss of citizenship for evading the draft by remaining outside the United States. This provision was also before the Court in *Perez*, but the majority declined to consider its validity. While Section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed. Section 401(g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial."

After studying the opinion rendered by the Supreme Court in the *Trop* and *Perez* cases, I have concluded that the law which must govern my re-consideration of the case under review is that Congress has the power to divest citizenship if a rational nexus exists between the content of a specific power in Congress and the action of Congress in carrying that power into execution, unless the action of Congress runs afoul of some provision of the Constitution, such as in the *Trop* case, the Eighth Amendment.

It is my view that the only powers of Congress which need to be considered in the reconsideration of this case

are (1) the power to regulate foreign affairs which power is fully set forth in the Perez case, and (2) the war powers of Congress set forth in Article I, Section 8, Clauses 1, 11, 12, 13, 14 and 18 of the Constitution of the United States.

It is the position of counsel for the defendant that Congress had the power to enact Section 401(j) under its powers to regulate foreign affairs and relied upon the Perez case in support of his position. In the Perez case the petitioner voted in a politically significant election while living in Mexico, which act was construed in the Perez case as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship, "fol. 13] ship," and as stated in the majority opinion in the Perez case, "makes the act potentially embarrassing to the American government and pregnant with the possibility of embroiling this country in disputes with other nations."

The petitioner's act in departing for Mexico for the purpose of evading training and service in the armed forces is to be condemned. It was an act for which he should have been and was punished. Such conduct, however, does not show a renunciation of his citizenship or an allegiance to a foreign power. While physically present in Mexico the petitioner committed no act which would import a dilution of his American citizenship or which might conceivably embarrass our government. So far as the record in this case shows, the conduct of the petitioner in Mexico was no different than the conduct of law-abiding American citizens who were lawfully in Mexico on visas or passports. It could not be contended that their physical presence in Mexico was a dilution of their American citizenship or that their presence there might be potentially embarrassing to the American government. I am unable to find any rational relationship between the power of Congress to regulate foreign affairs and the enactment by Congress of Section 401(j).

Under the so-called "war powers", Congress has the power to provide for the common defense; to declare war; to raise and support armies; to make rules for the gov-

ernment and regulation of the land and naval forces; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.

Is there a rational relationship between the powers above described and the enactment of Section 401(j)? Conceivably, Congress may have thought that making loss of citizenship a consequence of departing from the United States or remaining out of the United States in time of [fol. 14] war for the purpose of evading or avoiding training and service in the land and naval forces of the United States would deter citizens subject to such training and service from evading such service in such manner, and would thereby assist the authorities in raising the requisite manpower to successfully prosecute a war or provide for the common defense, or, conceivably, Congress may have thought that the morale of those who were subject to such service and training or those who had already been drafted into the service would be increased and thereby the efficiency of the armed forces might be improved.

Congress, however, enacted the Selective Service and Training Act of 1940, as amended, (50 App. U.S.C.A.). Section 311 thereof dealt with offenses and punishment under that Act. Said section provided, in substance, that any person who shall knowingly fail or neglect to perform any duty required by the Act or the rules and regulations made or directions given thereunder, or who shall otherwise evade registration and service in the land or naval forces, shall, upon conviction, be punished by imprisonment for not more than five years, or by a fine of not more than \$10,000.00, or by both such fine and imprisonment. The penalty applies regardless of whether the violation is by departing from the United States or in some other manner. In the instant case, the plaintiff departed from the United States for the purpose of evading service in the land and naval forces of the United States. He committed a felony for which he was subject to trial and punishment. For such violation, he plaintiff was punished by incarceration for a period of one year and one day and also suffered the loss of rights which resulted from conviction of a felony. If the plaintiff had remained in the United States and had evaded

service under the Selective Service and Training Act, he would have committed the same offense and would have [fol. 15] suffered the penalty provided for such violation, but he would not have been subject to expatriation.

It is my conviction that the enactment of Section 311 accomplished all legitimate purposes that Congress could have reasonably considered in the enactment of Section 401(j), and that any relationship between the enactment of Section 401(j) and the war powers of Congress is extremely tenuous and ineffectively remote. I am unable to find that the enactment of Section 401(j) could be reasonably calculated to implement war powers possessed by Congress.

My views on Section 401(j) are similar to the views entertained by Mr. Justice Brennan on Section 401(g) in his concurring opinion in *Trop v. Dulles*. Mr. Justice Brennan stated in the last paragraph of that opinion as follows:

"I therefore must conclude that Section 401(g) is beyond the power of Congress to enact. Admittedly, Congress' belief that expatriation of the deserter might further the war effort might find some—though necessarily slender—support in reason. But here, any substantial achievement, by this device, of Congress' legitimate purposes under the war power seems fairly remote. It is at the same time abundantly clear that these ends could more fully be achieved by alternative methods not open to these objections. In the light of these factors, and conceding all that I possibly can in favor of the enactment, I can only conclude that the requisite rational relationship between this statute and the war power does not appear—for in this relation the statute is not 'really calculated to effect any of the objects entrusted to the government' . . .", *McCulloch v. Maryland*, 4 Wheat. 316, 423—and therefore that Section 401(g) falls beyond the domain of Congress."

For the reasons herein expressed, I hold that Section 401(j) is unconstitutional and therefore the plaintiff is entitled to the relief sought in his amended complaint.

[fol. 16] Counsel for the plaintiff is directed to prepare and lodge proposed findings of fact, conclusions of law and form of judgment consistent with the views herein expressed.

The Clerk of this Court is directed to forthwith mail copies of this memorandum to all counsel.

Dated: September 24th, 1958.

/s/ Gilbert H. Jertberg
Judge,
United States District Court

[fol. 17]

[File endorsement omitted]

• • • • •

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

No. 1314-ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF

v.

ARGYLE R. MACKEY, The Commissioner of Immigration
and Naturalization, and WILLIAM P. ROGERS, Attorney
General of the United States, DEFENDANTS

**FINDINGS OF FACT, CONCLUSIONS OF LAW and
JUDGMENT—October 20, 1958**

FINDINGS OF FACT

1. Plaintiff was born in the United States on March 3, 1922, and thus was a citizen of the United States by birth.

2. Under the law of Mexico, plaintiff, now and ever since his birth, has been a citizen and national of the Republic of Mexico.

3. During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

4. Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946, for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

5. On June 23, 1947, plaintiff upon his plea of guilty was convicted in the United States District Court for the Southern District of California for violation of Section 11 of the Selective Service and Training Act of 1940. He was sentenced to imprisonment for a period of one year and a day.

[fol. 18] 6. On February 3, 1953, a warrant of arrest in deportation proceedings was served upon the plaintiff.

Pursuant to this warrant, a deportation hearing was held on May 25, 1953; and on September 11, 1953, the Special Inquiry Officer who presided at the hearing rendered his decision, ordering that plaintiff be deported from the United States as an alien.

7. Plaintiff appealed the decision of the Special Inquiry Officer to the Board of Immigration Appeals, Department of Justice, and on October 23, 1953, said Board dismissed plaintiff's appeal.

8. On the 22nd day of September, 1955, this Court entered judgment in the above cause, which judgment adjudicated and decreed that the plaintiff lost his United States citizenship and nationality through expatriation by remaining outside the jurisdiction of the United States after September 27, 1944, in time of war and during a period declared by the President of the United States to be a period of national emergency, for the purpose of evading and avoiding training and service in the land and naval forces of the United States.

9. This judgment was affirmed by the Court of Appeals for the Ninth Circuit on November 2, 1956.

10. On April 7, 1958, the Supreme Court of the United States vacated the judgment and remanded the cause "to the United States District Court for determination in light of *Trop v. Dulles*, ante, p. 86, decided March 31, 1958."

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and over this cause.

2. Section 401j of the Nationality Act of 1940, a 1944 Amendment, under which defendant claims the plaintiff lost his United States citizenship, is unconstitutional.

3. Plaintiff should be declared to be a citizen of the United States.

4. Any and all prior orders or decrees by the Commissioner of Immigration and Naturalization, by the Board of Immigration Appeals, or by any other board or person whomsoever, declaring the plaintiff to be an alien and to have lost his United States citizenship, and any

such order or decree directing that plaintiff be deported from the United States, should be declared null and void [fol. 19] and of no further force or effect.

JUDGMENT

The above entitled cause having come on regularly for hearing on the 19th day of July, 1958, before the Hon. Gilbert H. Jertberg, Judge Presiding without a jury, the plaintiff being represented by his attorneys DiGiorgio and Davis, by Thomas R. Davis, and the defendants being represented by their attorneys, Laughlin E. Waters, United States Attorney, Richard A. Lavine, Assistant U. S. Attorney, and James R. Dooley, Assistant U. S. Attorney, by James R. Dooley; and the facts having been submitted by written stipulation and written memorandum having been submitted by defendants only, and oral argument having been heard; it is hereby

ORDERED, ADJUDGED AND DECREED that Section 401j of the Nationality Act of 1940, a 1944 Amendment, is unconstitutional; that plaintiff is a citizen of the United States; that any and all prior orders or decrees by the Commissioner of Immigration and Naturalization, by the Board of Immigration Appeals, or by any other board or person whomsoever, declaring the plaintiff to be an alien and to have lost his United States citizenship, and any order or decree directing that plaintiff be deported from the United States be, and the same hereby is, declared null and void and of no further force or effect.

DATED: This 20th day of October, 1958.

/s/ Gilbert H. Jertberg
Judge, U. S. District Court

[fol. 20] [File endorsement omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

No. 1314-ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF

v.

ARGYLE R. MACKEY, The Commissioner of Immigration
and Naturalization, and WILLIAM P. ROGERS, Attorney
General of the United States, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES - Filed Nov. 17, 1958

I. Notice is hereby given that the above-named defendants appeal to the Supreme Court of the United States from the judgment of the District Court, entered October 21, 1958, declaring the plaintiff to be a citizen of the United States and prohibiting the deportation of the plaintiff as an alien, on the ground that Section 401(j) of the Nationality Act of 1940, as amended, is unconstitutional.

This appeal is taken pursuant to 28 U.S.C. 1252.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Printed Transcript of Record as filed in the Court of Appeals for the Ninth Circuit in No. 14997, 1956 Term.

[fol. 21] 2. Opinion of the Court of Appeals for the Ninth Circuit dated November 2, 1956.

3. Mandate of the Supreme Court.

4. Stipulation submitted to the Court at the hearing held on July 10, 1958.

5. Memorandum and Order of the District Court dated September 24, 1958.

6. Findings of Fact, Conclusions of Law and Judgment, entered October 21, 1958.

7. This Notice of Appeal.

III. The following question is presented by this appeal:

A. Whether Congress had constitutional power to provide in Section 401(j) of the Nationality Act of 1940, as amended, that a United States national shall lose his United States nationality by departing from or remaining outside the jurisdiction of the United States in time of war or national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

LAUGHLIN E. WATERS
United States Attorney
RICHARD A. LAVINE
Assistant U. S. Attorney
Chief of Civil Division

/s/ James R. Dooley
JAMES R. DOOLEY
Assistant U. S. Attorney
Attorneys for Defendants.

[fol. 22] AFFIDAVIT OF SERVICE BY MAIL—
(Omitted in Printing)

[fol. 23] Clerk's Certificate—(Omitted in Printing)

[fol. 24] SUPREME COURT OF THE
UNITED STATES

No. 649, October Term, 1958

ORDER NOTING PROBABLE JURISDICTION—March 9, 1959

APPEAL from the United States District Court for the
Southern District of California.

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable juris-
diction is noted.

March 9, 1959

[fol. 20] SUPREME COURT OF THE
UNITED STATES

No. 29, October Term, 1959

MACKEY, Commissioner of Immigration and
Naturalization Service, et al., APPELLANTS

VS.

FRANCISCO MENDOZA-MARTINEZ

JUDGMENT—April 18, 1960 (Filed in U.S.D.C.—
June 1, 1960)

APPEAL from the United States District Court for the
Southern District of California.

THIS CAUSE came on to be heard on the transcript of
the record from the United States District Court for the
Southern District of California, and was argued by
counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged
by this Court that this cause be, and the same is hereby,
remanded to the District Court with permission to the
parties to amend the pleadings, if they so desire, to put
in issue the question of collateral estoppel and to obtain
an adjudication upon it.

April 18, 1960

Dissenting opinion by Mr. Justice Clark with whom
Mr. Justice Harlan and Mr. Justice Whittaker join.

Separate opinion by Mr. Justice Frankfurter.

[SEAL]

A true copy

Test: JAMES R. BROWNING
Clerk of the Supreme Court of the United States
Certified this twenty-sixth day of May, 1960

By /s/ J. H. Blanchard
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
NORTHERN DIVISION

No. 1314 ND

FRANCISCO MENDOZA-MARTINEZ, Route 2, Box 412,
Delano, California, PLAINTIFF

vs.

ARGYLE R. MACKEY, The Commissioner of Immigration
and Naturalization, and HERBERT BROWNELL, Attorney
General of the United States, DEFENDANTS

SECOND AMENDED COMPLAINT (Amended pursuant to
mandate of the Supreme Court of the United States)

Filed June 30, 1960

Comes now the plaintiff and for cause of action alleges:

I

This is an action for a declaratory judgment as authorized by Section 1503a of Title 5 of the United States Code, and is brought because there is an actual controversy now existing between the parties to the above entitled action, as to which plaintiff now seeks the judgment of this court.

II

The jurisdiction of this court is based on Section 1503 of Title 5 of the United States Code.

III

Plaintiff resides in Delano, California, and in the Southern District of California.

IV

Plaintiff was born on the 3rd day of March, 1922, in [fol. 22] Bealville, California, United States of America.

V

In the year 1947 plaintiff was indicted in the District Court of the United States in and for the Southern District of California, Northern Division, for draft evasion in violation of the Selective Service and Training Act of 1940; a copy of said indictment is attached hereto as Exhibit "A"; thereafter and on or about June 23, 1947, plaintiff was adjudged guilty of the first count of the indictment aforesaid and sentenced to imprisonment for one year and one day by the Honorable Leon R. Yankwich presiding; a copy of said judgment and commitment is attached hereto as Exhibit "B"; under said judgment and commitment plaintiff thereafter was in fact imprisoned for the term therein provided.

VI

Plaintiff has been ordered deported from the United States by the defendants under authority of Section 401-j of the Immigration and Nationality Act of 1940.

VII

Pursuant to the requirement of a final administrative denial contained in Section 1503a of Title 8 of the United States Code, plaintiff has appealed to the Board of Immigration Appeals and the finding below has been confirmed.

VIII

Plaintiff relies first here upon his contention that the government of the United States has admitted the fact of his United States citizenship by virtue of the indictment and judgment of conviction attached hereto as Exhibits "A" and "B" and is therefore collaterally estopped now to deny such citizenship; plaintiff further contends that even if this be not so, Section 401-j of the Immigration and Nationality Act of 1940 as amended in 1944 is unconstitutional. Because of the collateral estoppel aforesaid and because of said unconstitutionality, plaintiff is and should be declared a citizen of the United States. As such citizen, plaintiff is not subject to deportation by

any law or statute of the United States and the order of deportation should be declared void and of no effect.

WHEREFORE, plaintiff prays that the Court adjudge:

[fol. 23] (1) That the defendants are estopped now to deny the United States citizenship of the plaintiff.

(2) That Section 401-j of the Immigration and Nationality Act of 1940 as amended in 1944 is unconstitutional and void "as applied to the plaintiff and on its face".

(3) That plaintiff is a citizen of the United States.

(4) That any and all orders of deportation directed against the plaintiff are void and of no force or effect whatever and, that defendants herein are enjoined and restrained henceforth from enforcing them.

DI GIORGIO AND DAVIS

/s/ Thomas R. Davis
Attorneys for Plaintiff
1021 Chester Avenue
Bakersfield, California
Telephone FAirview 4-4054

[fol. 24]

EXHIBIT "A" TO
SECOND AMENDED COMPLAINTFILED JUN 11 1947
EDMUND L. SMITH, Clerk
By Wm. A. White, Deputy ClerkIN THE
DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

April 1947, Term

No. 2771

INDICTMENT

(U.S.C., Title 50, App., Sec. 311—Selective Training and
Service Act, 1940, as amended)

UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANK MARTINEZ MENDOZA, DEFENDANT

The grand jury charges:

COUNT ONE

(U.S.C., Title 50, App., Sec. 311)

Defendant FRANK MARTINEZ MENDOZA, a male person within the class made subject to selective service under the Selective Training and Service Act of 1940, as amended, registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 137, said board being then and there duly created and acting, under the Selective Service System established by said act, in Kern County, California, in the Northern Division of the Southern District of California; and on or about November 15, 1942, in

violation of the provisions of said act and the regulations promulgated thereunder, the defendant did knowingly evade service in the land or naval forces of the United States of America in that he did knowingly depart from the United States and go to a foreign country, namely: Mexico, for the purpose of evading service in the land or naval forces of the United States and did there remain until on or about November 1, 1946.

COUNT TWO

(U.S.C., Title 50, App., Sec. 311)

Defendant FRANK MARTINEZ MENDOZA, a male person within the class made subject to selective service under the Selective Training and Service Act of 1940, as amended, registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 137, said board being then and there duly created and acting, under the Selective Service System established by said act, in Kern County, California, in the Northern Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on December 11, 1942, in Kern County, California, in the division and district aforesaid; and at said place, on or about December 11, 1942, and at all times thereafter, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do.

[fol. 25]

COUNT THREE

(U.S.C., Title 50, App., Sec. 311)

Defendant FRANK MARTINEZ MENDOZA, a male person within the class made subject to selective service under

the Selective Training and Service Act of 1940, as amended, registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 137, said board being then and there duly created and acting, under the Selective Service System established by said act, in Kern County, California, in the Northern Division of the Southern District of California; and on or about December 1, 1942, and at all times thereafter, in Kern County, California, within the division and district aforesaid, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he knowingly failed and neglected to keep said Local Board No. 137 advised of the address where mail would reach him.

A TRUE BILL

(signature) JOHN M. MACADAM
Foreman

(signature) JAMES M. CARTER
United States Attorney

RHK:AH

[fol. 26]

EXHIBIT "B" TO
SECOND AMENDED COMPLAINT

D.C. Form 61a

Judgment and Commitment
on the first count

DISTRICT COURT OF THE UNITED STATES
Southern District of California, Northern Division.

No. 2771 Criminal

in Three counts for violation of U.S.C., Title 50, App.,
Sec. 311, Selective Training and Service Act
Secs. 1940 as amended

UNITED STATES

v.

FRANK MARTINEZ MENDOZA

On this 23rd day of June, 1947 came the United States Attorney, and the defendant Frank Martinez Mendoza appearing in proper person, and without counsel and defendant having been informed of his right to counsel and a jury trial and having waived the same,

The defendant having been convicted on his plea of guilty of the offense charged in the first count in the above-entitled cause, to wit:

Having on or about November 15th 1942, knowingly departed from the United States to Mexico, for the purpose of evading service in the land or naval forces of the United States and having remained there until on or about November 1st 1946,

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

ORDERED AND ADJUDGED that the defendant, having been found guilty of said offenses, is hereby committed to the

custody of the Attorney General or his authorized representative for imprisonment for the period of one year and one day in an institution of the penitentiary type, on the first count.

IT IS FURTHER ORDERED that the second and third counts be dismissed, it appearing to the court that the offenses charged therein arose out of the same circumstances.

The court does not deem a reference necessary to the Probation Office prior to sentence.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein on the first count

(signed) LEON R. YANKWICH
United States District Judge

The Court recommends commitment of Penitentiary type institution.

A TRUE COPY. Certified this 23rd day of June 1947.
(signed) EDMUND L. SMITH, Clerk

(By) Francis E. Cross, Deputy Clerk

[fol. 27]

No.

UNITED STATES

v.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____
 Defendant noted appeal on _____ and
 released on _____

Did on _____)
 Did not _____) elect to enter upon service of sentence

Defendant's appeal determined on _____

Defendant surrendered on _____

Defendant delivered on July 15, 1947 to Federal Road Camp at McNeil Island, Washington, the institution designated by the Attorney General, together with certified copy of the within Judgment and Commitment.

Robert E. Clark
 U. S. Marshal

By (sgd) T. R. Keefe
 Deputy

FILED Aug. 5 1947
 EDMUND L. SMITH, Clerk
 By (sgd) Maxine Lewis

Deputy Clerk

[fol. 27a] • • • •

[fol. 28]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

[Title omitted]

ANSWER TO SECOND AMENDED COMPLAINT—
Filed July 8, 1960

The defendants above named, by and through the undersigned, in answer to the Second Amended Complaint on file herein, admit, deny and allege as follows:

I.

Neither admit nor deny the allegations contained in paragraphs I and II on the ground that said allegations are conclusions of law.

II.

Defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III, and on that ground deny said allegations.

III.

Admit the allegations contained in paragraph IV.

[fol. 29]

IV.

Admit the allegations contained in paragraph V, except the last clause which reads "under said judgment and commitment plaintiff thereafter was in fact imprisoned for the term therein provided." With respect to the excepted clause, defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and on that ground deny said allegations.

V.

Defendants deny the allegations contained in paragraph VI and allege instead that plaintiff has been ordered deported from the United States under the authority of Section 241(a)(1) of the Immigration and Nationality Act of 1952 after it was determined that plaintiff had lost his United States nationality under the provisions of Section 401(j) of the Nationality Act of 1940 as amended.

VI.

Admit the allegations contained in paragraph VII.

VII.

Deny each and every allegation contained in paragraph VIII.

FOR A FURTHER, SEPARATE AND FIRST AFFIRMATIVE DEFENSE, DEFENDANTS ALLEGE:

I.

Plaintiff was born in the United States on March 3, 1922 of Mexican parents and thus acquired citizenship and nationality of the United States at birth. Under the laws of Mexico, plaintiff was also at birth, and still is, a citizen and national of the Republic of Mexico.

[fol. 30]

II.

During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading or avoiding training and service in the land or naval forces of the United States; and plaintiff voluntarily remained in Mexico from some time during 1942 until on or about November 1, 1946 for the sole purpose of evading or avoiding training and service in the land or naval forces of the United States.

III.

Under the provisions of Section 401(j) of the Nationality Act of 1940, as amended, plaintiff lost his United

States citizenship and nationality by remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

FOR A FURTHER, SEPARATE AND SECOND AFFIRMATIVE DEFENSE, DEFENDANTS ALLEGE:

I.

The Second Amended Complaint on file herein fails to state a claim upon which relief can be granted.

WHEREFORE, defendants pray for a judgment dismissing said Complaint, denying the relief prayed for therein, and for such other relief as to the Court seems just and proper in the premises.

DATED: This 8th day of July, 1960.

LAUGHLIN E. WATERS
United States Attorney
RICHARD A. LAVINE
Assistant U. S. Attorney
Chief of Civil Division

/s/ James R. Dooley
JAMES R. DOOLEY
Asst. U. S. Atty.
Attorneys for Defendants.

JRD:bsh

[fol. 30a] CERTIFICATE OF SERVICE BY MAIL
(Omitted in Printing)

[fol. 31]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

[Title omitted]

AMENDED TRIAL STIPULATION—Filed August 17, 1960

The following admissions and agreements of fact were made by the parties and require no proof:

I.

The plaintiff, Francisco Mendoza-Martinez, claims residence within the City of Delano, State of California, and within the jurisdiction of this Court.

II.

The defendant, William P. Rogers, is the duly appointed, qualified and acting Attorney General of the United States, and as such is the head of the Department of Justice.

III.

The within action may be dismissed as to the defendant, Argyle R. Mackey, The Commissioner of Immigration and Naturalization, only.

[fol. 32]

IV.

Plaintiff was born in the United States on March 3, 1922 and thus was a citizen and national of the United States at birth.

V.

Under the laws of Mexico plaintiff is now, and ever since his birth has been, a citizen and national of the Republic of Mexico.

VI.

During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

VII.

Plaintiff had resided in the United States from the date of his birth up to the time of his departure from the United States as set forth in Paragraph VI above.

VIII.

Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946 for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

IX.

On June 23, 1947 plaintiff, upon his plea of guilty, was convicted in the United States District Court for the Southern District of California, Northern Division, for violation of Section 11 of the Selective Training and Service Act of 1940, as amended [U. S. C., Title 50, App., Sec. 311]. He was sentenced to imprisonment for a period of one year and one day, and thereafter served his sentence.

[fol. 33]

X.

On February 3, 1953 a warrant of arrest in deportation proceedings was served upon the plaintiff. Pursuant to this warrant, a deportation hearing was held on May 25, 1953; and on September 11, 1953, the Special Inquiry Officer who presided at the hearing rendered his decision, ordering that plaintiff be deported from the United States as an alien.

XI.

Plaintiff appealed the decision of the Special Inquiry Officer to the Board of Immigration Appeals, United States Department of Justice, and on October 23, 1953, said Board dismissed plaintiff's appeal.

XII.

The within cause is submitted to the Court for decision upon the above admissions and agreements, all the records

and files herein, all evidence heretofore received, together with the following exhibits to be offered at trial:

1. Indictment in United States of America v. Frank Martinez Mendoza, No. 2771.

2. Judgment and Commitment on the first count in *United States of America v. Frank Martinez Mendoza*, No. 2771.

ISSUES OF FACT TO BE TRIED

None

ISSUES OF LAW

1. Is the defendant herein estopped by reason of the indictment and conviction of plaintiff for violation of Section 11 of the Selective Training and Service Act of 1940, as amended [U. S. C., Title 50, App., Sec. 311], from denying that the plaintiff is now a national and citizen of the United States?

[fol. 34] 2. Is Section 401 (j) of the Nationality Act of 1940, as amended, unconstitutional, either on its face or as applied to the plaintiff herein?

The foregoing Amended Trial Stipulation is hereby approved.

DATED: This 15th day of August, 1960.

DI GIORGIO AND DAVIS

By /s/ Thomas R. Davis
Attorneys for Plaintiff.

LAUGHLIN E. WATERS
United States Attorney

RICHARD A. LAVINE
Assistant U. S. Attorney
Chief of Civil Division

/s/ James R. Dooley
Assistant U. S. Attorney
Attorneys for Defendants.

The foregoing admissions of fact having been made by the parties, and issues of fact and law being thereupon stated and agreed to; the Court hereby approves the foregoing Amended Trial Stipulation which shall govern the course of the trial unless modified to prevent manifest injustice.

DATED: This 17th day of August, 1960.

/s/ Gilbert H. Jerthberg
United States District Judge

JRD:bsh

[fol. 35]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

No. 1314-ND

FRANCISCO MENDOZA MARTINEZ, PLAINTIFF

vs.

WILLIAM P. ROGERS, Attorney General of the
United States, DEFENDANT

MEMORANDUM AND ORDER—September 22, 1960

The above cause is before the court for the third time. On the 22nd day of September 1955, this court entered judgment which adjudged and decreed that plaintiff lost his United States citizenship and nationality through expatriation by remaining outside the jurisdiction of the United States after September 27, 1944, in time of war and during a period declared by the President of the United States to be a period of national emergency, for the purpose of evading and avoiding training and service in the land and naval forces of the United States. On April 7, 1957, the Supreme Court of the United States vacated the judgment, and remanded the cause "to the United States District Court for determination in light of *Trop v. Dulles*, ante, p. 86, decided March 31, 1958," 356 U.S. 258.

[fol. 36] Pursuant to the order of the Supreme Court a hearing was held before this court on July 10, 1958.

At the hearing held on July 10, 1958, the only issue presented to the court for determination was an issue of law which the parties posed as follows: Is Section 401(d) of the Nationality Act of 1940 [54 Stat. 1137] unconstitutional, either on its face or as applied to plaintiff? The issue of law to be determined was submitted to the court on a written trial stipulation wherein the parties stipulated:

1. That plaintiff was born in the United States on March 3, 1922, and thus was a citizen of the United States by birth;

2. Under the laws of the Republic of Mexico plaintiff was then and ever since his birth had been a citizen and national of the Republic of Mexico;

3. During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the armed forces of the United States;

4. Plaintiff remained in Mexico continuously from some time during 1942 until on or about November 1, 1946, for the sole purpose of evading and avoiding training and service in the armed forces of the United States;

5. On June 23, 1947, plaintiff upon his plea of guilty was convicted in the United States District Court for the Southern District of California, for violation of Section 11 of the Selective Service and Training Act of 1940, and he was sentenced to imprisonment for a period of one year and one day;

6. On February 3, 1953, a warrant of arrest, in deportation proceedings was served upon plaintiff. Pursuant to this warrant a deportation hearing was held on May 25, [fol. 37] 1953, and on September 11, 1953, the special inquiry officer who presided at the hearing rendered his decision ordering that plaintiff be deported from the United States as an alien; and

7. Plaintiff appealed the decision of the special inquiry officer to the Board of Immigration Appeals, Department of Justice, and on October 23, 1953 said Board dismissed plaintiff's appeal.

Following the hearing, and on September 24, 1958 this court filed its memorandum and order holding unconstitutional Section 401(j), and on October 21, 1958, findings of fact, conclusions of law and judgment of law were entered accordingly.

On a direct appeal to the Supreme Court of the United States, the cause was on April 18, 1960 again remanded to this court "with permission to the parties to amend the pleadings, if they so desire, to put in issue the question of collateral estoppel, and to obtain an adjudication upon it." 362 U.S. 384 at 387.

On or about June 30, 1960 plaintiff filed a second amended complaint raising the issue of collateral estoppel. The allegations of the second amended complaint in this respect are that in the year 1947 plaintiff was indicted for draft evasion, in violation of the Selective Service and Training Act of 1940; that plaintiff was adjudged guilty of the first count of the indictment and sentenced to imprisonment for one year and one day, and that under said judgment and commitment plaintiff was in fact imprisoned for the term therein provided. Copies of the indictment and of the judgment and commitment are attached as exhibits. In its answer the defendant admitted the foregoing allegations, except that it denied, for lack of information and belief, the allegation that plaintiff was in fact [fol. 38] imprisoned for the term provided under the judgment and commitment.

Following the filing of the amended pleadings, there was filed herein an amended trial stipulation, which is identical to the trial stipulation previously mentioned except there is added the fact that plaintiff resided in the United States from the date of his birth up to the time of his departure from the United States to Mexico in 1942, and that the action may be dismissed as to the defendant Argyle R. Mackey, the Commissioner of Immigration and Naturalization.

Under the amended trial stipulation there are no issues of fact to be tried, and the issues of law to be determined are posed in the following form:

Issues of Law

1. Is the defendant herein estopped by reason of the indictment and conviction of plaintiff for violation of Section 11 of the Selective Service and Training Act of 1940, as amended [U.S.C. Title 50 of Appendix, Section 311d] from denying plaintiff is now a national and citizen of the United States?

2. Is Section 401(j) of the Nationality Act of 1940, as amended, unconstitutional, either on its face, or as applied to the plaintiff herein?

Pursuant to the order of the Supreme Court, a hearing was held on August 23, 1960. The plaintiff was repre-

sented by DiGiorgio & Davis, Thomas R. Davis appearing. The defendant was represented by Laughlin E. Waters, United States Attorney, James R. Dooley, Assistant United States Attorney, appearing. Neither party offered the testimony of any witness. There was received in evidence as Plaintiff's Exhibits A and B respectively a copy of the indictment and a copy of the judgment and [fol. 39] commitment. Following oral arguments and the filing of additional legal memoranda the cause was submitted to the court for its decision upon the trial stipulation, the records and files and the above mentioned exhibits.

The indictment is in three counts. Count one, to which the plaintiff pleaded guilty, after alleging that plaintiff was a "male person within the class made subject to selective service" and that he had "registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 137," charged that "on or about November 15, 1942, in violation of the provisions of said act and the regulations promulgated thereunder, the defendant did knowingly evade service in the land or naval forces of the United States of America in that he did knowingly depart from the United States and go to a foreign country, namely: Mexico, for the purpose of evading service in the land or naval forces of the United States and did there remain until on or about November 1, 1946."

Count two of the indictment charged plaintiff with failure to report for induction on December 11, 1942, as ordered. Count three charged plaintiff with failure to keep the draft board advised of the address where mail would reach him.

The judgment and commitment dated November 23, 1947, after reciting that the defendant [plaintiff herein] had appeared in court without counsel, having been informed of his right to counsel and a jury trial and having waived the same, and having been convicted on his plea of guilty of the offense charged in the first count of the indictment, to-wit: "Having on or about November 15th 1942, knowingly departed from the United States to Mexico, for the purpose of evading service in the land

[fol. 40] or naval forces of the United States and having remained there until on or about November 1st 1946" it was ordered and adjudged that the defendant be "committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one year and one day in an institution of the penitentiary type, on the first count." The judgment and commitment also states "It is further ordered that the second and third counts be dismissed, it appearing to the court that the offenses charged therein arose out of the same circumstances."

I will consider the issue of collateral estoppel.

It is the plaintiff's contention that while the Selective Service and Training Act of 1940, as amended, made male citizens and male persons residing in the United States, between certain ages, subject to military service, the Act did not apply to non-resident aliens; that plaintiff became a non-resident alien on September 27, 1944, the effective date of that Act, in accordance with the provisions thereof; and that when defendant in 1947 charged plaintiff with draft evasion between September 27, 1944 and November, 1946, such charge could be applicable only if plaintiff were then a citizen. From these premises plaintiff argues that when the trial court found plaintiff guilty of draft evasion during the period between September 27, 1944 and November, 1946, that the judgment of conviction necessarily included an adjudication of citizenship, and that such judgment brings into play the doctrine of collateral estoppel. In short, plaintiff contends that the judgment of conviction presupposed that plaintiff had not been denationalized under Section 401(c), and that therefore defendant is estopped to deny in this cause that plaintiff is a citizen or that he is entitled to the relief which he seeks.

It appears to be well settled that collateral estoppel [fol. 41] may arise from a criminal proceedings to estop a party in a subsequent civil action. *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558. While the parties assume in their briefs that collateral estoppel may arise from a criminal proceedings prosecuted by the United States to estop the United States in a subsequent civil

action to which it is a party, I find it unnecessary to comment on such point.

Nothing appears in the record to indicate that the defendant asserted plaintiff's citizenship as a basis for his liability for induction, nor did the statute require any such assertion. The Selective Service and Training Act of 1940, as amended, provided in Section 3(a) that all male persons residing in the United States, as well as all male citizens, whether residing in the United States or not, were subject to the draft. 50 U.S.C. Appendix 303 (1940 edition, Supplement 1). In 1942 plaintiff was a male citizen within the class made subject to selective service, a class which comprised both citizens and non-citizens. Plaintiff, therefore, as a male person residing in the United States in 1942 was liable for induction irrespective of whether he was a citizen or simply a resident of the United States. Furthermore, it appears from the indictment that plaintiff was ordered to report for induction on December 11, 1942. The count of the indictment to which the plaintiff pleaded guilty necessarily included the failure to obey that order. In 1942, therefore, plaintiff as a male person within the class made subject to selective service was liable for induction whether he was a citizen or a resident alien. If either a male citizen or a male resident of the United States departed from the United States during war for the purpose of evading service, he would be subject to prosecution for draft [fol. 42] evasion upon his return to this country. The gist of the crime charged to which plaintiff pleaded guilty was evasion by leaving the country in 1942. In my view the further language of count one, reading "and did there [Mexico] remain until on or about November 1, 1946," is immaterial and is to be treated as mere surplusage. In his brief plaintiff states that he "invokes no mere technical defense. He relies on a determination by the original trial judge on the basis of which he actually suffered punishment. If the trial court had found that the extent of his offense was from 1942 to 1944, instead of 1942 to 1946, it seems an inevitable inference that the penalty imposed would have been mitigated accordingly." I find nothing in the record to support any inference that the

trial judge increased the punishment which would have otherwise been imposed absent the fact that plaintiff remained in Mexico after September 27, 1944. This is particularly true when considered in the light of the trial judge's statement in dismissing counts two and three, and the fact that the trial judge could have imposed punishment by "imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment."

It is my conclusion that the prior criminal proceeding against plaintiff did not necessarily or in actual fact make any determination as to plaintiff's citizenship and, therefore, the doctrine of collateral estoppel is not applicable.

In respect to the question posed "Is Section 401 unconstitutional, either on its face or as applied to the plaintiff?" I reaffirm the views expressed in my memorandum and order of September 24, 1958, which followed the second hearing on July 10, 1958. In addition, following [fol. 43] my further study of the several views expressed by the members of the Supreme Court of the United States in *Trop v. Dulles*, 356 U.S. 86, and *Perez v. Brownell*, 356 U.S. 44, I desire to add the following paragraph:

The *Trop* case did not involve Section 401(g), but involved Section 401(g) of that Act, which provides that a citizen shall lose his nationality "by deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by a court martial and as a result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces;"

The *Perez* case involved Section 401(e) of the Act, which provides that a person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory.

In addition to the views expressed in my memorandum and order of September 24, 1958, I construe Section 401(d), which provides for automatic divestiture of citizenship, as essentially penal in character and deprives the plaintiff of procedural due process. In my

view the requirements of procedural due process are not satisfied by the administrative hearing of the Immigration Service nor in this present proceedings.

Pursuant to the stipulation of the parties, the action may be dismissed as to the defendant Argyle R. Mackey, the Commissioner of Immigration and Naturalization.

The plaintiff is entitled to the relief sought. Counsel for the plaintiff is directed to prepare and lodge proposed findings of fact, conclusions of law and form of judgment consistent with the views herein expressed.

The Clerk of this Court is directed to forthwith mail [fol. 44] copies of this memorandum to all counsel.

Dated: September 22, 1960.

s. Gilbert H. Jertberg
District Judge

[fol. 45]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

No. 1314-ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF

vs.

WILLIAM P. ROGERS, Attorney General of the
United States, DEFENDANT

FINDINGS OF FACT, CONCLUSIONS OF LAW and JUDGMENT
Filed October 18, 1960—Entered October 19, 1960

The above entitled cause having come on regularly for hearing on the 23rd day of August, 1960, before the Honorable Gilbert H. Jerberg, Judge Presiding without a jury, the plaintiff being represented by his attorneys, Di Giorgio and Davis, by Thomas R. Davis, and the defendant being represented by his attorney, Laughlin E. Waters, United States Attorney, Richard A. Lavine and James R. Dooley, Assistant United States Attorneys, by James R. Dooley; and the facts having been submitted by written stipulation and written memoranda having been submitted, and documentary evidence having been submitted by the plaintiff and oral argument having been heard; and the Court having taken the cause under submission and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

[fol. 46]

FINDINGS OF FACT

I

The plaintiff, Francisco Mendoza Martinez, is a resident of the City of Delano, County of Kern, State of California, and is within the jurisdiction of this Court.

II

The defendant, William P. Rogers, is the duly appointed, qualified and acting Attorney General of the United States, and as such is the head of the Department of Justice.

III

Plaintiff was born in the United States on March 3, 1922, and thus was a citizen and national of the United States at birth.

IV

The father and mother of the plaintiff were at the time of the birth of the plaintiff citizens and nationals of Mexico; under the Constitution and Laws of Mexico plaintiff is now and ever since his birth has been a citizen of the Republic of Mexico by virtue of his parentage and without regard to his place of birth; the foregoing finding is intended to be solely and exclusively a recitation as to the law of Mexico according to its Constitution and Statutes and it is not intended to carry with it any other or broader connotation.

V

During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

VI

Plaintiff had resided in the United States from the date of his birth up to the time of his departure from the United States as set forth in Finding of Fact V above.

[fol. 47]

VII

Plaintiff remained in Mexico continuously from some time during 1942 until on or about November 1, 1946 for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

VIII

On June 23, 1947, plaintiff, upon his plea of guilty, was convicted in the United States District Court for the Southern District of California, Northern Division, for violation of Section 11 of the Selective Training and Service Act of 1940, as amended; plaintiff's Exhibits A and B, being respectively a copy of the indictment and of the Judgment and Commitment, are true and correct copies of the original documents.

IX

Plaintiff was sentenced to imprisonment for a period of one year and one day and thereafter served said sentence.

X

On February 3, 1953, a warrant of arrest in deportation proceedings was served upon the plaintiff. Pursuant to this warrant, a deportation hearing was held on May 25, 1953; and on September 11, 1953, the special inquiry officer who presided at the hearing rendered his decision, ordering that plaintiff be deported from the United States as an alien.

XI

Plaintiff appealed the decision of the special inquiry officer to the Board of Immigration Appeals, United States Department of Justice, and on October 23, 1953, said Board dismissed plaintiff's appeal.

CONCLUSIONS OF LAW

I

This Court has jurisdiction over the subject matter of [fol. 48] the within action under the provisions of Section 360 (a) of the Immigration and Nationality Act, 66 Stat. 273, 8 U.S.C.A. Sec. 1503(a).

II

Argyle R. Mackey, The Commissioner of Immigration and Naturalization is not a proper party to the within action, and the action as to him should be dismissed.

III

The defendant is not estopped, by virtue of the criminal indictment and conviction of the plaintiff for draft evasion, or for any other reason, from asserting that the plaintiff has lost his United States nationality and citizenship under the terms and provisions of Section 401(j) of the Nationality Act of 1940, a 1944 Amendment.

IV

Section 401 (j) of the Nationality Act of 1940, a 1944 Amendment, under which defendant claims the plaintiff lost his United States nationality and citizenship, is unconstitutional, both on its face and as applied to the plaintiff herein.

V

The plaintiff is now, and ever since the date of his birth has been, a national and citizen of the United States; and judgment should be entered accordingly.

JUDGMENT

In accordance with the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED, ADJUDGED, AND DECREED:

1. That the within action be, and the same is hereby dismissed as to the defendant, Argyle R. Mackey, The Commissioner of Immigration and Naturalization, only;

2. That Section 401 (j) of the Nationality Act of 1940, a 1944 Amendment, is unconstitutional both on its [fol. 49] face and as applied to the plaintiff herein;

3. That the plaintiff is now, and ever since the date of his birth has been, a national and citizen of the United States.

DATED: This 18th day of October, 1960.

/s/ Gilbert H. Jertberg
Judge of the
United States District Court

[fol. 50]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed November 4, 1960

I. NOTICE IS HEREBY GIVEN that the above-named defendant appeals to the Supreme Court of the United States from the judgment of the District Court, entered October 19, 1960, declaring the plaintiff to be a citizen of the United States, on the ground that Section 401(j) of the Nationality Act of 1940, as amended, is unconstitutional.

This appeal is taken pursuant to 28 U.S.C. 1252.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Printed Transcript of Record as filed in the Court of Appeals for the Ninth Circuit in No. 14997, 1956 Term.
- [fol. 51] 2. Opinion of the Court of Appeals for the Ninth Circuit dated November 2, 1956.
3. Mandate of the Supreme Court, dated April 7, 1958.
4. Trial stipulation submitted to the district court at the hearing held on July 10, 1958.
5. Memorandum and Order of the district court dated September 24, 1958.
6. Findings of Fact, Conclusions of Law and Judgment, entered October 21, 1958.
7. Mandate of the Supreme Court dated April 18, 1960.
8. Plaintiff's Second Amended Complaint including Indictment filed on June 11, 1947 and Judgment and Commitment entered on or about June 23, 1947.

9. Answer to Second Amended Complaint filed July 8, 1960.

10. Amended Trial Stipulation.

11. Memorandum of the district court dated September 22, 1960.

12. Findings of Fact, Conclusions of Law and Judgment entered October 19, 1960.

13. Indictment filed on June 11, 1957 and Judgment and Commitment entered on or about June 23, 1947 received in evidence as plaintiff's exhibits A and B respectively.

14. This Notice of Appeal.

III. The following question is presented by this appeal:

[fol. 52] Whether Congress had constitutional power to provide in Section 401(j) of the Nationality Act of 1940, as amended, that a United States national shall lose his United States nationality by departing from or remaining outside the jurisdiction of the United States in time of war or national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

DATED: This 3rd day of November, 1960.

LAUGHLIN E. WATERS
United States Attorney
RICHARD A. LAVINE
Assistant U. S. Attorney
Chief of Civil Division

/s/ James R. Dooley
Assistant U.S. Attorney
Attorneys for Defendants

[fol. 52a]

AFFIDAVIT OF SERVICE
(Omitted in Printing)

[fol. 53]

Clerk's Certificate to foregoing
transcript omitted in printing.

[fol. 54] SUPREME COURT OF THE
UNITED STATES

No. 566, October Term, 1960

WILLIAM P. ROGERS, Attorney General of the
United States, APPELLANT

vs.

FRANCISCO MENDOZA-MARTINEZ

ORDER NOTING PROBABLE JURISDICTION—February 20, 1961

APPEAL from the United States District Court for the
Southern District of California.

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable juris-
diction is noted and the case is transferred to the summary
calendar.

[fol. 55] SUPREME COURT OF THE
UNITED STATES

No. 566, October Term, 1960

WILLIAM F. ROGERS, Attorney General of the
United States, APPELLANT

vs.

FRANCISCO MENDOZA-MARTINEZ

ORDER OF SUBSTITUTION—April 3, 1961

ON CONSIDERATION of the motion to substitute Robert F. Kennedy in the place of William F. Rogers as the party appellant in this case,

It Is ORDERED by this Court that the said motion be, and the same is hereby, granted.

[fol. 56] SUPREME COURT OF THE
UNITED STATES

No. 566, October Term, 1960

ROBERT F. KENNEDY, Attorney General of the
United States, APPELLANT

vs.

FRANCISCO MENDOZA-MARTINEZ

ORDER GRANTING MOTION TO USE RECORD IN No. 29,
OCTOBER TERM, 1959—April 17, 1961

ON CONSIDERATION of the motion for leave to use the record in No. 29, October Term, 1959, in this case,

It Is ORDERED by this Court that the said motion be, and the same is hereby, granted.